IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 35 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

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COMMISSIONER OF INCOME-TAX

Versus

HINDUSTAN CONSTRUCTION CO.

Appearance:

1. INCOME TAX REFERENCE No. 35 of 1989
MR Mauna BhattHfor petitioner.No. 1
SERVED BY RPAD - (N) for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 05/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

At the instance of the Revenue, the following

question of law is referred to this Court for its opinion:-

"Whether, the Tribunal was right in law and on facts in holding that the "dumpers" were used as "earth moving machinery" by the assessee and entitled to depreciation at the rate of 30% ?"

2. The Income Tax Officer in the course of assessment proceedings allowed depreciation at the rate of 30% to the assessee.

3. The Commissioner of Income-tax initiated proceedings under section 263 of the I.T. Act on the ground that the order passed by the ITO was erroneous in so far as it was prejudicial to the interest of the revenue. According to the Commissioner of Income-tax the dumpers were covered in "Road making plant and machinery" appearing at item No. III B(14) of Appendix I Part I of Rule 5 of the I.T. Rules, 1962 and depreciation was available at the rate of 15% only. The assessee contended that Dumpers came under the classification of "earth moving machinery" covered by item III D(4) of the Appendix. The Commissioner of Income-tax turned down the objections raised by the assessee and directed the ITO to allow depreciation at the rate of 15%.

4. The Appellate Tribunal after considering the relevant Entries of Appendix-I as well as Circular issued by C.B.D.T., held that Dumpers would be entitled to depreciation at the rate of 30%. The Appellate Tribunal, therefore, set aside the order made by the Commissioner of Income-tax under section 263 and restored the order made by the I.T.O.

5. We have heard Mrs. Mauna Bhatt, learned Standing Counsel appearing for the Revenue. No one appears on behalf fo the respondent though notice was duly served.

6. At the time of hearing of this Reference, our attention is drawn to the decision of this Court in the case of Shiv Construction Co. vs. Commissioner of Income-tax (1987) 165 ITR 160 wherein this Court has confirmed the view taken by the Tribunal that dumpers were machinery or tools used for the business of the assessee and that for that reason, the assessee cannot be denied the claim of depreciation at the rate of 30% on the ground that the dumpers were road transport vehicles.

7. Since the facts of the present case are identical with the facts fo the case of Shiv Construction Co. vs. CIT (Supra) and no distinguishing feature has been pointed out, we are of the view that the assessee is entitled to depreciation at the rate of 30% on the dumpers employed in the business of road construction.

8. We, therefore, answer the question referred to us in the affirmative i.e., in favour of the assessee and against the Revenue.

9. The Reference is accordingly disposed of with no order as to costs.

[M.S. Shah, J.]

rmr. [K.A. Puj, J.]